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IN THE

Supreme Court of the United States

October Term, 1961

NO. 463

SOLOMON DEHYDRATING COMPANY, Incorporated,
Petitioner,

v.

CLARENCE R. GUYTON, CENTRAL GREYHOUND LINES, INC., AND GREYHOUND CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Solomon Dehydrating Company, Inc., hereby respectfully petitions for a writ of certiorari to review the judgment and decision of the United States Circuit Court of Appeals for the Eighth Circuit in Case No. 16,584, entered therein on July 19, 1961. This judgment affirmed a judgment of the United States District Court for the District of Nebraska, upon jury verdicts in a diversity action arising out of a bus-truck collision, the verdicts being in favor of the respondents and against the petitioner.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit denying petitioner's motion to discharge or reduce the attachment is found at 283 F.2d 247 and is marked Appendix I. The opinion of the United States Circuit Court of Appeals for the Eighth Circuit affirming the judgment and verdict below is found at — Federal 2d —. It is marked Appendix II.

JURISDICTION

The verdicts of the jury in the United States Court of the District of Nebraska were entered on May 2, 1960 (R. 82). The judgments on the verdicts were entered by the District Court on May 5, 1960, and May 7, 1960 (R. 83,84,85). The District Court order on the Motions for an Order setting aside the verdicts, to enter judgment in accordance with motion for a directed verdict and in the alternative for an order granting a new trial was entered by the District Court on June 7, 1960 (R. 89). The opinion of United States Circuit Court of Appeals for the Eighth Circuit was entered on July 19, 1961. A Motion for Rehearing was overruled by the Circuit Court on August 31, 1961. An Order staying issuance of the mandate pending filing Petition for Certiorari was entered September 6, 1961. Jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

1. Is it proper for the Eighth Circuit Court to refuse to consider the claim and assignment of error that a verdict is excessive, and refuse to review trial court's denial of motion for new trial on such a ground, either in all events, or only in such exceptional cases which consist

of "those rare situations" where the appellate Court is "pressed to conclude" that there is an "absolutely plain injustice" or a "monstrous result" or a "shocking result", or according to a practice which admittedly applies "a somewhat tighter standard" than is observed by any of the other Circuits of the United States?

2. Is the Seventh Amendment to the Constitution of the United States a bar to the Eighth Circuit court's jurisdiction to review the denial by the trial court of a motion for new trial on the ground that the verdict is excessive?

3. Where a Nebraska statute provides that "all vehicles entering or crossing highways or railroad crossings on which stop signs are erected shall come to a full stop as near the right-of-way line as possible, before entering or crossing such highway or railroad crossings—" and where the federal trial court below instructed the jury that such right-of-way line, so defined by such Nebraska statute, meant the part of the highway "set aside for public travel", and that such line was also the same line as the "curb line", and that a driver therefore had to come to a full stop as near the curb line as possible, and where such instruction and such definition of the statutory right-of-way line were duly objected to, and where such construction of the statute leads to an absurd result when applied to railroad crossings, and is unreasonable when applied to both railroads and highways, and otherwise conflicts with both federal and state cases on statutory construction, will such instruction be approved?

4. Is a federal circuit court bound by obiter dicta in state court decisions under the circumstances disclosed by this case?

5. Was it proper for the Eighth Circuit Court to affirm the trial court's exclusion of Solomon's expert witness' opinion testimony as to speed of the automobile, based on length of skid marks and other physical facts under these circumstances: The exclusion of the evidence was prejudical to petitioner; the expert was admittedly qualified; Nebraska law admittedly permits an expert to state such an opinion; the exclusion was approved by the Eighth Circuit Court for a reason *not* stated at the trial; petitioner's attorney at trial asked the trial judge to state the reason for his ruling but the trial court refused to state his reason; and if the objection relied on by the Circuit Court had been made at the trial, it could easily been corrected by rephrasing the question or by laying further foundation?

6. Was it proper for the Eighth Circuit Court to affirm the District Court judgment under these circumstances; —Solomon's attorney asked an admittedly qualified expert witness, for his opinions on various matters, in a series of questions which the Eighth Circuit Court impliedly admits were proper; all of the questions were duly objected to and sustained, and, as to some of them, thereafter offers were made, and all of such issues both where offers were and were not made, were raised both on appeal and in the motion for rehearing; these matters, were all ignored by the Eighth Circuit Court and the exclusions of such were affirmed without comment; the expert witness involved was petitioner's key defense witness and his testimony was important to petitioner's case and its exclusion was very prejudicial to him.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VII, United States Constitution, provides:

"In Suits at common law, where the value in con-

troversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Section 39-729, 1960 Re-issue of Volume 3, Revised Statutes of Nebraska of 1943, in pertinent part, provides:

> "All vehicles entering or crossing highways or railroad crossings on which stop signs are erected shall come to a full stop as near the right-of-way line as possible, before entering or crossing such highway or railroad crossings, and, regardless of direction, shall give the right-of-way to vehicles upon the highways to be driven upon or crossed. All vehicles entering or crossing highways or railroad crossings on which are installed traffic signals or traffic lights, shall come to a stop or shall go as indicated by the traffic signal or traffic light."

STATEMENT OF CASE

This is a diversity action arising out of a bus-truck collision which occurred on a main east-west arterial highway in Nebraska on July 29, 1959. Guyton, the original plaintiff, was the driver of the Greyhound bus. Solomon Dehydrating Company owned the truck which was driven by Fisher. Guyton commenced action for personal injuries against Solomon in the Federal District Court for the District of Nebraska (R.1); he joined Greyhound as a defendant. Solomon filed a counterclaim against Guyton (R.6), and a cross-claim against Greyhound (R.7). Greyhound filed a cross-claim against Solomon (R.10). These various claims were based respectively on the alleged negligence of Guyton, and of Fisher, who drove Solomon's truck. Jury verdicts were returned for $74,132.63 in favor of Guyton against Solomon, and for $16,356.77 in favor

of Greyhound against Solomon (R.82). Solomon appealed (R.89).

This Petition is based upon several grounds, some of which are related and will be grouped together, and all of which deal with matters wherein there are conflicts between this Eighth Circuit Court decision and decisions of other circuits.

The brief facts relating to these several matters are as follows:

1. Re:-Review of verdict in favor of Greyhound on ground that verdict was excessive (Apx. p. 15).

Guyton sustained hip and leg dislocations and fractures. He was operated upon. He has a stiff hip which causes him to walk with a limp (R.19,20,24). He has no disability except in his lower right extremity and that disability was estimated at only 60% of the lower right extremity (R.20). A further operation would reduce his disability of the lower right extremity by 10 to 15%, but Guyton refused to permit the operation (R.20). Guyton was advised to wear a special foot brace, but would not do so (R.20). Guyton was 61 years of age at time of trial (R.23). He had to retire at age 65. His average monthly wage for the 5 years preceding the accident was $542.61. Until age of retirement Guyton would receive social security and other supplements totaling $318.92 a month, that amount being only $223.71 a month less than his average salary (R.21,22). The evidence vaguely implies that after retirement Guyton's benefits would be reduced about $67.82 per month (R.21). Using expectancy tables (R.49), these vague loss of benefits could probably not exceed $8,219.78. Thus Guyton's gross loss would probably amount to only $18,957.89, without any reduction to pre-

sent worth, and without considering reduction for income taxes (*Southern Pacific v. Guthrie*, 1949, 9 Cir., 180 F. 2d 205, 302), and without considering that Guyton was not totally disabled, but had only a maximum 60% loss of use of his lower right extremity, which loss of use could be still further reduced by an operation, and without considering Guyton's refusal to use a prescribed brace. The record does not disclose any extraordinary pain and suffering. See court's opinion, which, to us, indicates clearly that the Circuit Court believed the verdict to be excessive (Apx. pp. 19,20).

2. Re:-Failure to properly instruct jury as to right-of-way line (Apx. p. 11).

Section 39-729, 1960 Reissue of Volume 3, Revised Statutes of Nebraska for 1943, in part provides:

> "All vehicles entering or crossing highways or railroad crossings on which stop signs are erected shall come to a full stop as near the right-of-way line as possible, before entering or crossing such highway or railroad crossings * * *." (Apx. pp. 11,12).

The trial court, in its instruction, defined right-of-way line and described a driver's duty to stop as follows:

> "The right-of-way as used in the statute means that portion of the highway set aside for public travel. As applied to this case therefore, bearing in mind that Highway 30 in the area in question is a state and federal highway, and because of the stop sign at the intersection in question, it would be the duty of a driver approaching Highway 30 to come to a full stop as near the curb line—or right-of-way line—as possible before driving onto it and give the right-of-way to vehicles upon the highway until such time, after stopping, as he could drive onto the highway without interfering with the traffic thereon" (R.66).

The instruction was duly excepted to (R.75).

The facts disclose that Fisher, driving Solomon's truck north, approached an east-west arterial highway. A stop sign was located at the right hand side of the north-south road 25 feet south of the paved portion of the arterial road and almost exactly on the property line of southern edge of the highway right-of-way (Map, Ex. 48, R.121, 23 to 28, 30,34).

Some evidence indicates that Fisher came to a full stop with his truck about even with the sign; however, he did not stop the second time at the edge of the pavement (R.26,27,28,30,31,32). Guyton once testified that Fisher stopped only 10 feet back from the paved portion of the highway (R.23).

The visibility was good and drivers on the arterial could see Fisher's truck while it was stopped by the stop sign (R.26-30).

3. Re:-Exclusion of expert testimony (Apx. p. 9).

Professor W. F. Weiland of the University of Nebraska was called as an expert witness for the petitioner, Solomon (R.37). The trial court admitted that he was "eminently qualified in his field" (R.42). Professor Weiland was asked a hypothetical question seeking his opinion as to the speed of bus at the time it struck the truck (R.39,40).

Guyton's attorney at once commenced cross-examination as to foundation (R.40,41). He was interrupted, however, by the statement from the Court, that "I think we are wasting time because I am not going to permit the witness to express his opinion" (R.41). At that time there

had been no objection to question. Thereafter, Guyton's attorney asked no further questions, direct examination proceeded and then objection was made to the hypothetical question in substance as follows: that there was "nc proper or sufficient foundation"; that it was "improper"; that it "invaded the province of the jury"; that it did not contain "a correct resume" of prior testimony; that it did "not take into consideration the fact that the truck was driverless"; that "there was no testimony in the record about whether the truck was coasting along the shoulder and then turned over into the barrow pit"; that the question failed to reflect "the fact that the driver of the bus had a shattered leg which he could not use on the brakes"; that there was "a complete absence of all proper elements of a proper" hypothetical question; that there was "no proper and sufficient foundation laid for the expression of an opinion by" the witness (R.42).

The court sustained the objection, although, as stated above, it recognized that Professor Weiland was eminently qualified. The trial judge then added that "it would be highly prejudicial and improper to permit the witness to testify" (R.42).

Attorney for Solomon asked the Court to state the basis for sustaining the objection but the Court refused to do so (R.42). Thereafter Solomon's attorney proceeded to make his offer to the effect that the witness would have testified the bus was traveling at least 65 miles an hour at the time of the collision (R.43). The maximum allowable speed for the bus was either 55 miles (R.66), or only 50 miles per hour if it was considered to be a freight-carrying vehicle. (See R.77 and Court's opinion, Apx. p. 21). Proof of violation of the speed law, under Nebraska is not negligence as a matter of law, but it is evidence of negligence (R.67).

Subsequently, other questions were asked Professor Weiland, many of which were objected to and every objection was sustained. These questions included questions dealing with the effect that certain marks in photographs had on the witness' computations, how certain photographic marks demonstrated that the truck was pushed, how determination of initial point of impact could be made from photographs; testimony as to trucks maximum speed in low gear (R.42 to 49).

Offers were made to some of these after the trial court's ruling (R.43,44).

It is extremely significant to note that, at one place, without objection, the expert witness testified that the position of the vehicles and the actual skid marks on the highway furnished him with information as to the method by which the truck was *pushed* eastward (R.44), but when asked in what way they demonstrated that, the court sustained an objection which barred the answer (R.44). The importance of this fact lies in the fact that the Eighth Circuit Court's only reason for not reversing the case on this point was that "there is no evidence in the record which supports a conclusion that the truck was pushed * * * (Apx. pp. 10,11).

REASONS FOR GRANTING THE WRIT

Point I.

The decision of the Eighth Circuit Court is in conflict with the decisions of the other Circuit Courts on the issue of the reviewability of a judgment claimed to be excessive (Apx. p. 15).

a. It is difficult, if not impossible, to determine exactly the present position of the Eighth Circuit Court on

this matter for reasons to be hereafter pointed out, except that they have a "tighter standard" than any of the other circuits (Apx. p. 19).

To assist us in attempting to determine what the position of the Eighth Circuit Court now is, we believe that, like the Circuit Court did, in its opinion, we should review its prior holdings. We seek to determine to what extent, if any, the Eighth Circuit Court cases have shown any dilution of their primary position that they had no authority to review a judgment claimed to be excessive. This matter becomes important because the court, after suggesting they may make exceptions in rare cases, added that, "In any event, we still adhere to it," (Apx. 19), which we understand to mean that the Eighth Circuit still adheres to their former practice and decisions. The following, although not complete, would appear to be an illustrative sample of the Eighth Circuit's prior holdings.

For many decades prior to 1949 the Eighth Circuit Court's position was clear and unequivocal. They held the matter:

"Not reviewable" or "will not review."
1907 *Chicago M. & St. P. Ry. Co. v. Heil*, 154 Fed. 626.
1931 *Southern Ry. Co. v. Walters*, 47 F. 2d 3.
1934 *Chicago & N. W. Ry. Co. v. Kelly*, 74 F. 2d 31.
1947 *Chicago & N. W. Ry. Co. v. Green*, 164 F. 2d 55.

"Cannot be questioned."
1926 *Sun Oil Co. v. Rhodes*, 15 F. 2d 790.
1930 *United States Can Co. v. Ryan*, 39 F. 2d 445.

"Cannot be considered."
1928 *St. Louis-San Francisco Ry. Co. v. Ewan*, 26 F. 2d 619.

1930 *Public Utilities Corporation v. McNaughton*, 39 F. 2d 7.
1930 *Interstate Stage Lines Co. v. Ayres*, 42 F. 2d 611.

"Appellate Court 'without authority.'"
1933 *Kroger Grocery, etc. v. Yount*, 66 F. 2d 700.

Then in 1949, in *Louisville & N. R. Co. v. Botts*, 173 F. 2d 164, 170, Judge Johnsen stated that the matter of an excessive verdict "is, of course, not reviewable by a federal appellate court—at any rate not except as a matter of correcting an *absolutely plain injustice* * * *". (Emphasis supplied). Note: the correct language is shown here; it is not as shown in opinion at page 19 of the Appendices.

Later in 1949, in *New York, C. & St. L. R. Co. v. Affolder*, 174 F. 2d 486, 493, Judge Collet held that an "assignment of error that the verdict is excessive is not properly addressed to this court".

Still later in 1949, in *Chicago & N. W. Ry. Co. v. Curl*, 178 F. 2d 497, the court repeated its *Affolder* case ruling. It then added at page 502, "Assuming, as appellant contends * * * that this court may and should reverse a judgment in the exceptional case * * *" nevertheless the court found nothing to justify that action in that case.

Six months later, in *St. Louis Southwestern Ry. Co. v. Ferguson*, 182 F. 2d 949, Judge Johnsen, referring to the *Botts* and *Curl* cases, at page 954, said "Dictum in two of our own cases can perhaps also be said to contain a suggestion of dilution." Later in the opinion, however, Judge Johnsen added, "It may be that a change in the rule is desirable * * *", but "* * * the change is not one which we would feel entitled to make" (Page 955). Thus the Eighth Circuit expressly excluded all exceptions to their rule,

despite implications to the contrary in the opinion at pages 17 to 19 of the Appendices.

About a year later, in August 1951, the court decided the case of *Missouri-K.-T.R. Co. v. Ridgway,* 191 F. 2d 363. As to this case, the present court, in its opinion (Page 17), said, "And in at least one instance, we have reversed a judgment because, among other things, we concluded the verdict was ' so excessive as to shock the conscience' * * *". However, an examination of *Ridgway* opinion will disclose that the court, after stating (P.367) that they "quite consistently held * * * (that) the excessiveness of the verdict * * * can not be considered as a ground for reversal by this court," then proceeded to examine the evidence, and after which it said Pp. 368,369), "Having reached the conclusion that the amount of the verdict is not fairly supported by the evidence we turn to a consideration of the alleged misconduct of counsel in his argument to the jury, with a view of determining whether the verdict is the result of passion and prejudice aroused by his argument." After a consideration of the matter of prejudice, the court concluded (Page 370), "Convinced as we are that the defendant did not have a fair trial and that the verdict was influenced by the improper appeals * * * to passion and prejudice, the judgment * * * is reversed."

In April, 1953, in *Zimmerman v. Mathews Trucking Corp.*, 203 F. 2d 864, the court stated (Page 868) that it had "* * * consistently adhered to the proposition that the responsibility for keeping jury awards within reasonable bounds is essentially that of the trial courts and not of this Court."

In June, 1954, in *Glendenning Motorways, Inc. v. Anderson*, 213 F. 2d 432, 437, the court said "* * * the excessiveness

of a verdict is a question to be determined by the trial court * * * and cannot be considered as a ground for reversal." Apparently as an afterthought, the court, then added, "*While the matter is not properly before us, we observe in passing* that the verdict cannot properly be said to be 'monstrous' nor such as 'shocks the judicial conscience * * *' ". (Emphasis supplied).

It will be observed that, again, at this point, the Circuit Court holds there is no exception to the general rule in Eighth Circuit; excessiveness of a verdict can not be considered by that court.

In 1955, in *National Alfalfa Dehydrating & Milling Co. v. Sorensen,* 220 F. 2d 858, 861, the court bluntly reiterated its position that "excessiveness of the verdict is not reviewable on appeal."

In 1956, in *Chicago Great Western Railway Company v. Casura,* 234 F. 2d 441, 448, 449, the court held that excessiveness cannot be considered "* * * at least where the verdict is not such as has been designated by the United States Supreme Court as 'monstrous', or such as to shock the judicial conscience."

In January, 1957, in *Railway Express Agency v. Epperson,* 240 F. 2d 189, 196, repeated its firm position as stated in the 1955 *Sorensen* case, but in June, 1957, in *Chicago, Rock Island & Pacific Railroad Co. v. Williams,* 245 F. 2d 397, 406, the Eighth Circuit returned to language somewhat similar to the 1956 *Casura* case, but at the same time citing, with others, the *Zimmerman & Sorensen* cases, supra.

From that time up to the present the Eighth Circuit has "adamantly" adhered to the position that it would not re-

view or consider the question of excessiveness of the verdict and that they were not at the liberty to interfere. There were no new suggestions of dilution and there were no exceptions to the general rule, although there were a few throwbacks to old suggestions of dilution. In three of the cases the court discussed the Seventh Amendment to the Constitution of the United States as a bar to consideration of the matter.

April 1958, *Agnew v. Cox*, 254 F. 2d 263 (7th Amendment at page 267).

June 1958, *American Surety v. Schottenbauer*, 257 F. 2d 6, 13.

June 1959, *Myra Foundation v. U. S.*, 267 F. 2d 612 (7th Amendment at page 614).

August 1959, *McDonnells v. Timmerman*, 269 F. 2d 53 (7th Amendment at page 62).

January 1960, *Johnson v. Hill*, 274 F. 2d 110, 117.

June 1960, *Lycon v. Walker*, 279 F. 2d 478, 485.

May 1961, *MacDonald Engineering Co. v. Hover*, 290 F. 2d 301, 307.

In the light of the extraordinary consistency of its position, it is not difficult to understand the Eighth Circuit Court's repeated statements showing evasion and uncertainty as to its present position as set forth in its opinion at Appendix II. Note the following statements from the Court's opinion:—

At Page 16 "* * * we have *intimated* that reviewability might be in order * * *." At Page 18, "We are *not quite sure* * * *." At Page 19, "And we *wonder* whether in fact we did start to 'wobble a bit' * * *." At Page 19, "*Perhaps*

this is saying nothing more and nothing different than what the other courts of appeals have said * * *." In any event, they add, "*Perhaps* in practice this court has observed a somewhat tighter standard than the others." (Emphasis in quotations supplied.)

As will have been observed, the Eighth Circuit, during the last ten to twelve years, has been oscillating between what Judge Johnsen called a "suggestion of dilution" and the "adamant" denial of review without any exceptions what so ever. They have right to oscillate again in their present opinion. They imply they have done so by stating "* * * we shall continue to consider review, * * * not routinely and in every case, but only in those rare situations where we are pressed to conclude that there is (absolutely) 'plain injustice' or a 'monstrous' or 'shocking' result." The chief difficulty in understanding this is that the court ends its statement by saying, "In any event, we still adhere to it." While the antecedent of "it" is not clear, we understand it to be their latest prior practice, and if this is so, then it is an "adamant" denial of all right to review. (Apx. p. 19).

Whether this view of their decision is correct or not is really immaterial. If it is correct, then the Eighth Circuit Court is in sharp and direct conflict with all other circuits. Even if the above view is not correct, and if we accept at face value the statement that the Eighth now will consider review-not routinely and in every case, but only in those rare situations which they describe, we still run into at least three serious difficulties. The first difficulty is this:— How long will this new position of the Eighth last in view of the long history of oscillation by dicta in this circuit? The second difficulty is that even the present concession of the Eighth is so slight as to be of no practical value in achiev-

ing justice through elimination of excessive verdicts. The third objection is also of vital significance here. The Eighth Circuit even with its present questionable concession continues in sharp conflict with the rules in other circuits. The Eighth Circuit, itself, in its recent opinion, has frankly conceded this, when they stated "Perhaps in practice *this Court has observed a somewhat tighter standard than the others. In any event we still adhere to it*" (Apx. p. 19). (Emphasis supplied.)

b. To summarize the position of the other circuits we refer briefly to the quotation from Moore's Federal Practice, 2 Ed., 1953, Vol. 6, Par. 59.08 (6), as found in the Eighth Circuit opinion, Pages 17, 18, where is is stated in part:

> "* * * (T)he Eighth and the Second Circuits are the most adamant expounders (of the doctrine of non-reviewability) * * * (Page 3834). The theory upon which the majority of the circuits review * * * is that the trial judge has abused his discretion. * * * Thus, the First, Third, Fourth, Sixth, Seventh, Ninth and Tenth Circuits and the District of Columbia now recognize that they may reverse a judgment even though the only basis for review is the inadequacy or excessiveness of the verdict" (Pages 3836, 3838).

As further pointed out in the opinion in this case, at Page 18, the Fifth Circuit, in *Silverman v. Travelers Insurance Company*, 1960, 277 F. 2d 257, 259, and the Second Circuit, in *Dagnello v. Long Island R. R. Co.*, 1961, 289 F. 2d 797, 798 to 806, both now clearly hold that they may review the question of excessiveness.

In Barron and Holtzoff, Federal Practice and Procedure (Wright Revision of 1958), Vol. 3, Sec. 1302.1, pages 348 to 350, it is said:

> "Perhaps no subject in the entire field of procedure has been subject to so much change and controversy in recent years as has been the proper scope of review in an appellate court of the denial of a new trial by the trial court. * * * It was long well settled in federal court that it was exclusively for the trial court to determine whether a new trial should be granted because the verdict was excessive. * * * (I)n 1945 Judge Herbert Goodrich, speaking for the Third Circuit (Scott v. Baltimore & O. Ry., 151 F. 2d 61, 64), said 'The members of the Court think the verdict is too high. But they also feel very clear there is nothing the Court can do about it * * *.' In the years since Judge Goodrich spoke, there has been considerable development in the law on this point. Ten of the eleven courts of appeals have intimated, at least in dicta, that perhaps they can do something about excessive verdicts. Only the Eighth Circuit has refrained from such a statement."

Obviously, Professor Wright, who prepared the revision and who is referred to in the opinion (Apx. p. 18) with apparent approval, considered that the Eighth Circuit's many blunt assertions that they would not review questions of excessiveness were repudiations of the earlier tentative dicta and mild suggestive implications of right, in "rare" situations, to review.

c. The consideration of the application and effect of the Seventh Amendment to the Constitution of the United States upon this question of review of excessiveness of verdicts is pertinent. It has been the position of the Eighth Circuit, commencing with *Agnew v. Cox*, 254 F. 2d 263, that the Seventh Amendment barred review. Even in its present decision, its earlier views on the Seventh Amendment are not repudiated. We suggest that either the Seventh Amendment bars review or it does not. We doubt greatly that a constitutional amendment acts as a bar to

review in all except certain "rare" situations to be determined from time to time at the discretion of the various circuits. It would seem to bar review in all situations or none. All circuits and all text writers with which we are acquainted, with the possible exceptions of Professor Wright (Court's opinion, Apx. p. 18) and the Eighth Circuit, now hold that the Seventh Amendment is not here controlling. See *Dagnello v. Long Island R. R. Co.*, 289 F. 2d 797, 802 to 805; Moore's Federal Practice, 2 Ed., 1953, Vol. 6, Par. 59.08 (6), at page 3827, and Fordham Law Review, 1959, Vol. 28, pp. 500, 502.

The United States Supreme Court has expressly reserved for future determination the question of whether or not the Seventh Amendment should be construed as forbidding appellate review in this type of situation. See *Neese v. Southern Railway Company*, 1955, 350 U. S. 77, 76 S. Ct. 141, 100 L. Ed. 60; also *Dagnello v. Long Island R.R. Co.*, above cited, 289 F. 2d 797, at page 801.

d. It appears clear to us that the Eighth Circuit Court here believes that the verdict below was excessive, especially in view of the fact that Guyton refused to undergo surgery which would have reduced his disability and the fact that he refused to wear a recommended foot brace, but that the Circuit Court felt here, as Judge Goodrich and the other judges of the Third Circuit did in *Scott v. Baltimore*, 151 F. 2d 61, 64, that they could not do anything about it ' in the light of our cases already referred to." (Apx. p. 20). That is not surprising. The standards which the Eighth Circuit Court have self imposed are, for most purposes, practically synonymous with a denial of the right to review. This present situation is an excellent example of the fact that there is a good possibility that there can never be, in the Eighth Circuit, a case that will be deemed

by that Court to meet its present impossible standards and so be labeled as one of those "rare" situations in which they are "pressed" to act. It is pertinent to note that the Eighth Circuit Court has here "observed a somewhat tighter standard than the" * * * other circuits. (Apx. p. 19). We submit that the new suggested Eighth Circuit Court standards still constitute, for all practical purposes, a denial of the right of review and that the Eighth Circuit Court still maintains its "adamant" position. Particularly is this view certain, in view of the fact that the court now says that "In any event, we still adhere to * * *" our former practice (Apx. p. 19).

Because of the broad and sharp conflicts between circuits on this issue of review of excessive damages, the writ should be granted. This is a most important problem in appellate review. The extremely large number of federal cases in all circuits which have frequently considered this problem with extremely conflicting results establishes the vital need that it now be clearly resolved by the United States Supreme Court.

Point II.

This decision of the Eighth Circuit Court is in conflict with decisions of United States Court, and of other Circuit Courts, and of the Nebraska State Supreme Court, as to the construction of a Nebraska statute, and this Circuit Court mistakenly assumes it is bound by obiter dicta in two Nebraska decisions. (Apx. p. 11).

As stated in the court's opinion (Apx. pp. 11,12), a Nebraska statute provides in part:

> "All vehicles entering or crossing highways *or railroad crossings* on which stop signs are erected shall come *to a full stop as near the right-of-way line as possible,*

before entering or crossing such highway *or railroad crossings* * * *." (Emphasis supplied).

Sec. 39-129, 1960 Reissue of Volume 3, Revised Statutes of Nebraska for 1943.

The court's instruction stated in part:

"The right-of-way line as used in the statute means that portion of the highway set aside for public travel. * * * (I)t would be the duty of a driver * * * to come to a full stop as near the curb line—or right-of-way line—as possible before driving onto it * * *" (R. 66).

At the trial the instruction was objected to "for the reason that the right-of-way line * * * is not defined thusly, and it is the intention of said statute to define the right-of-way line as the outside line of the highway, itself, and is not confined to just the main traveled portion of said highway" (R. 75,76).

A determination as to the correctness of this trial court instruction is of the greatest importance not only to Solomon but also to every motorist in the State of Nebraska.

We believe that it may safely be assumed that Nebraska motorists, and others throughout this country, generally stop their vehicles about even with stop signs, and they do so because they believe they are required to stop in such a position, and they believe they are not supposed to stop elsewhere; particularly is this true where the vision of none of the drivers at the intersection is obscured; in this case the vision of none of the drivers was obscured.

By this instruction, in conjunction with another instruction which the court gave the jury (R. 67), the jury was told that the act of Solomon's driver, in stopping his

truck by the stop sign, instead of at the edge of the pavement, should be considered by the jury as evidence of negligence on the part of Solomon's driver. If the court's instruction was erroneous, it was highly prejudical to Solomon and could have played a vital part in the final jury verdict.

The crux of the issue, raised by this petitioner by its exception to the instruction at the trial, and in this petitioner's brief on appeal in Circuit Court, but which was not discussed by the Eighth Circuit Court in its opinion, is the statutory definition of the right-of-way line. The Nebraska statute requires all motorists to stop as near as possible to "the right-of-way line." But what and where is the right-of-way line? How is it defined? One thing at least is obvious, the same phrase applies in the same manner to both highways and railroads. The trial court defined right-of-way line in two ways, which the trial court presumably intended to be synonymous, namely, (1) "the portion of the highway set aside for public travel" and (2) "the curb line" (R.66). The exception of this petitioner was that right-of-way line should be defined "as the outside line of the highway, itself," and was "not confined to just the main traveled portion" and that trial court's definition of right-of-way line was different from what the statute intended (R.75,76).

The Circuit Court's opinion concedes that the issues here presented were raised by Solomon (Apx. p. 13).

The basic criteria of statutory construction includes these rules:

(1) Significance and effect must be given to each word and phrase of a statute; all parts and words are to be construed together to give uniform meaning and purpose.

82 C. J. S. 705, Sec. 346, citing United States, Federal and Nebraska cases.

50 Am. Jur. 361, Sec. 358, citing United States, Federal and Nebraska cases.

U. S. v. Menasche, 348 U. S. 528, 75 S. Ct. 513, 99 L. Ed. 615.

Belgum v. City of Kimball, 163 Neb. 774, 81 N. W. 2d 205, 62 A. L. R. 2d 1295.

School Dist. v. State Bd., 164 Neb. 148, 82 N. W. 2d 8.

(2) A statute must always be construed so as to avoid objectionable or unreasonable results and absurd meanings. See the following authorities:

82 C. J. S. 622, Sec. 326, citing United States, Federal and Nebraska cases.

50 Am. Jur., 385, Sec. 377, citing United States, Federal and Nebraska cases.

U. S. v. Bryan, 339 U. S. 323, 94 L. Ed. 884, 70 S. Ct. 724.

U. S. v. Brown, 333 U. S. 18, 92 L. Ed. 442, 68 S. Ct. 376.

U. S. v. American Trucking Ass'n., 310 U. S. 534, 84 L. Ed. 1345, 60 S. Ct. 1054.

State v. U. S., 4 Cir., 1947, 165 F. 2d 869, 1 A. L. R. 2d 213.

Ledwith v. Bankers Life, 156 Neb. 107, 54 N. W. 2d 409.

Safeway Cabs v. Homer, 155 Neb. 418, 52 N. W. 2d 266.

The above rules were violated by the trial court's instruction and by the Circuit Court's approval of such instruction.

We believe these things to be self evident:

(a) that the same definition of right-of-way line, in this statute, must apply to both railroad crossings and to highway crossings;

(b) that a vehicle approaching a railroad crossing and a vehicle approaching a highway crossing each has the same duty to stop at substantially the same location with respect to each such crossing;

(c) that if a vehicle approaching a highway crossing must stop at the edge of the curb or traveled portion of the highway, because that is the right-of-way line of a highway, then a vehicle approaching a railroad crossing must similarly stop at the rails or, at least at the edge of the ties, because correspondingly such places would represent the right-of-way line of a railroad;

(d) that the trial court's definition ignores the phrase "railroad crossing";

(e) the result stated in (c) above is absurd, and the Nebraska statute, which was intended to aid in safety, if such rule were to be enforced, would be transformed into a monster that could create confusion, havoc and even death on Nebraska highways.

We assert that the practical effect, on the citizens of Nebraska, of a decision on this point could be of great significance. The implications and results of this decision, if followed, may be extraordinary. The following statements, we believe, necessarily follow from the approval of this instruction:

(a) It is evidence of negligence for any driver on Nebraska highways to stop his vehicle by a stop sign, and then, without stopping again, to cross a highway or a railroad crossing, assuming good visability, unless, of course, the stop sign was located at the very edge of the paved

portion of the highway or at the ties of the railroad. That is exactly, in effect, what the trial court here instructed the jury and that is what was affirmed by the circuit court.

(b) Any driver on Nebraska highways, in order that his actions shall not constitute evidence of negligence, must drive his vehicle to the edge of the pavement, or to the ties of the railroad, and there come to a full stop, regardless of where the stop sign at such crossing is located. This also is the holding of both lower courts.

(c) Any driver, in any town or city of Nebraska, in absence of city ordinance or other law otherwise providing, who approaches an arterial street, may be considered negligent, who stops his vehicle at a stop sign located by a cross walk; instead, such driver, to avoid having his actions constitute evidence of negligence, must drive right by the cross walk to the extension of the curb line where he must then come to a full stop regardless of pedestrians on the cross walk and regardless of the flow of traffic.

The foregoing conclusions are all literally required by the trial court's instructions in this case; yet such rules are obviously impractical; they are unreasonable to the point of absurdity; and they are inimical to the safety and best interest of the Nebraska driving public because they create serious driving hazards.

A construction of this Nebraska statute which is practicable, and in line with legislative intent, and conducive to driving safety, is deemed essential. Only such a construction will meet the standards adopted by both Federal Courts and the Nebraska Supreme Court for judicial construction of Nebraska statutes. That is not the kind of construction given this Nebraska statute by either the trial Court or the Eighth Circuit Court. The standards

for statutory construction, used by the Eighth Circuit in approving this instruction, of necessity, were in direct and sharp conflict with standards for statutory construction approved by other circuits, by the United States Supreme Court, and by the Nebraska Supreme Court.

The Eighth Circuit Court, in apparent justification of its affirmance of this trial court instruction, and indicating apparently that they considered they were thereby bound, cited brief quotations from two Nebraska cases, namely *Styskal v. Brickey*, 158 Neb. 208, 214, 62 N. W. 2d 854, 860, and *Paddock v. Patrick*, 163 Neb. 355, 363, 364, 79 N. W. 2d 701, 706, 707. (See appendix pp. 14,15). The quoted portions, relied upon by the Eighth Circuit Court, are not judicial dicta but at very best an inferior obiter dicta.

Other circuit courts have held that they are not bound by dicta of state courts. In *Walker v. Felmont Oil Co.*, 6 Cir., 1957, 240 F. 2d 912, it is stated in Syl. 8: "Dictum from state court of last resort is not binding upon federal district court in adversity of citizenship action."

See also the following circuit court cases:

Buder v. New York Trust Co., 2 Cir., 1939, 107 F. 2d 705, cert. den. 309 U. S. 677, 60 S. Ct. 715, 84 L. Ed. 1022.

De Long v. Jefferson Standard Life Insurance Co., 5 Cir., 1940, 109 F. 2d 585, cert. den. 310 U. S. 635, 60 S. Ct. 1081, 84 L. Ed. 1405.

New England Mutual Life Insurance Co., 4 Cir., 1941, 118 F. 2d 414, cert. den., 314 U. S. 629, 62 S. Ct. 60, 86 L. Ed. 505.

In the *Styskal* case, supra, 158 Neb. 208, 215, 62 N. W. 2d 854, 860, the accident occurred in South Omaha, Nebraska;

one street crossed the other at an angle, and the non-angling street jogged. In this unusual situation, the arterial street was protected by both automatic stop lights and stop signs. Without reference to Section 39-729 of the Nebraska statutes the Nebraska Court made its quoted comment about stopping at a curb line where there was a stop sign (Apx. p. 14); but that comment was obiter dicta, for the Court then continued by pointing out that the controlling signals were the automatic lights and not the stop sign. The issue here presented was not before that court; the statute here in question was not before the Nebraska court for construction.

In the *Paddock* case, supra, 163 Neb. 355, 363, 364, 79 N. W. 2d 701, 706, 707, the accident occurred in the country where there was no curb. The view of the drivers of both colliding cars was obstructed by a frame building and a dump truck. In our case, there were no obstructions. In *Paddock* case, the Court failed to cite Section 39-729, of the Nebraska statutes; but it did quote, as did this Eighth Circuit Court also, from *Bohnen v. Gorr*, 234 Minn. 71, 47 N. W. 2d 459, although Minnesota's statute relating to stop signs was entirely different from the applicable Nebraska statute. See *Bohnen* case, supra, at 234 Minn. 75 and 47 N. W. 2d 462. Even so, the *Bohnen* case holds that one should ordinarily stop "where the stop sign is erected," although it may not be sufficient to do so "where the view of the highway is obstructed." To the extent that the Minnesota case applies it establishes that both the Trial Court and the Eighth Circuit are both in error. The comments of the Nebraska court were obita dicta. The issue presented in the present case was not before the Nebraska court; the statute here in question was not before that court for construction.

Because the action of the Eighth Circuit Court in affirming the trial court's instruction is contrary to many United States Circuit and Nebraska Supreme Court cases it should be reversed. Its absurd result affects many Nebraska motorists who are placed in the unfair and hazardous position of either being classed as negligent if they act safely at the crossing or of actually being negligent if they attempt to comply with the trial court's construction of the law.

Point III.

The decision of the Eighth Circuit Court is in conflict with decisions of the United States Court, and with other Circuit Courts, and is in violation of Rule 46 of Federal Rules of Civil Procedure, in sustaining the exclusion of expert testimony on a ground which was not raised at trial, where, if such ground had then been stated at the trial, the objection could readily have been corrected by rephrasing the question or by laying further foundation, and especially where counsel requested the trial court to state the reason for its exclusion and trial court refused to do so. Additional grounds for reversal by this court's action are also hereafter stated (Apx. p. 9).

a) Although the Circuit Court below, in its opinion (Apx. 9 to 11) discussed only one situation where the trial court excluded expert testimony, being a matter relating to a hypothetical question, actually there were a number of such instances of wrongly excluded evidence which occurred at the trial. For the first situation, dealing with the hypothetical question, which is the situation the court discussed, see Record Pages 39 to 42; this matter will be commented upon beginning with sub-paragraph b) hereof, p. 30. As to the second situation, dealing with excluded expert testimony, other than the hypothetical question, which the

court did not discuss, see Record pages 43 and 48. Petitioner's comments as to this second situation follow immediately.

Counsel for Solomon asked his expert witness, Weiland, many questions. The trial court sustained every objection made to these questions. In some cases offers were made and in others offers were not made (R. 43-48).

Under Nebraska law, with facts such as are disclosed by this record, it is not necessary, in order to predicate error upon a ruling of the trial court refusing to permit a witness to testify, that an offer be made to prove the facts sought to be elicited, for the record clearly discloses that the questions were relevant, material and competent. See *Fries v. Goldsby*, 1956, 1663 Neb. 424, at syllabus 9, and at page 437, 80 N. W. 2d 171, at syllabus 11, and at page 179.

It is provided by Rule 43 (a), of the Federal Code of Civil Procedure, that "all evidence shall be admitted which is admissible under the Statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearings of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States Court is held. This rule was acknowledged by the Eighth Circuit Court in its opinion (Apx. p. 10), but was not here followed.

We contend that the responses to all of these questions which were objected to were improperly excluded. The Eighth Circuit Court expressly announced the rule which required the reversal of all these trial court rulings when it held, in effect, that an expert could give his opinion based on physical evidence (Apx. p. 10). Then the Circuit Court

proceeded to ignore all instances where the trial court excluded testimony of this vital expert witness, making no comment about these situations, excepting only in the one instance of the court's ruling upon the hypothetical question.

No reason or justification for affirming the exclusion of any of these trial court rulings was given by the Eighth Circuit Court. Each of these questions was competent, material and relevant. The petitioner was greatly prejudiced by the improper exclusion of all of this testimony of his chief expert witness. We know of no case that would support affirmance. We submit that reversal is required.

This matter is of great importance, not only to Solomon here but to all others who are litigants and appeal. The issue is this: Can proper grounds for reversal of several erroneous rulings be ignored by an appellate court, thereby justifying affirmance of the case, through the simple process of the appellate court shutting its eyes to the error committed by the trial court?

b) Our further comments in this section of this petition relate to the Circuit Court's affirmance of the trial court's exclusion of a hypothetical question which was asked an admittedly qualified expert witness. This is an extremely important matter and the ruling of the Eighth Circuit Court conflicts squarely with United States and other Circuit Court decisions.

While the trial court specifically refused to state the basis of his ruling (R. 42), when he sustained an objection to the hypothetical question, we submit that the clear implication of the record is that the trial court excluded the evidence on theory that such testimony would invade the

province of the jury and not because of the form of the question. This is evidenced not only by the trial court's language that "it would be highly prejudicial and improper to permit the witness to testify" (R. 42), but also because the trial court cut off cross-examination as to foundation by making a statement that he was "not going to permit the witness to express his opinion" (R. 41), before any objection had been made to the question.

The foregoing emphasizes the fact that the Eighth Circuit Court's basis for its action was a claimed error that was not included in the objection made at the trial, and not raised until appeal. Specifically, the objection at trial to the hypothetical question can be summarized as follows: (1) The hypothetical invaded the province of the jury; (2) the hypothetical was not a correct resumé of the facts; (3) there was not sufficient foundation; and (4) then the objection listed three specific factual errors, namely, (a) that there was no reference to the truck being driverless, (b) that there was no testimony in the record about the course of the truck, and (c) that there was no reflection of the fact that the driver's shattered leg prevented his application of the brakes (R. 42).

The Eighth Circuit Court's affirmance of the exclusion was explained as follows: "There is no evidence in the record which supports a conclusion that the truck was *pushed* sidewise by the bus (Emphasis by court). * * * Inasmuch as the hypothetical question embraced an important fact not supported by the evidence, it is defective and subject to objection" (Apx. pp. 10,11).

This ground was *not* included in the objection to the hypothetical question which was made by counsel at the trial, and it was first raised on appeal.

In *Williams v. Kirtland,* 80 U. S. 306, 13 Wall. 306, 20 L. Ed. 683, the identical question here at issue was presented to that court resulting in a holding there which is directly contrary to that of the Eighth Circuit in this present case. In its opinion the court said "There is one error in the ruling of the court below which will require reversal * * *." An offer of evidence was made "* * * but the offer was rejected under the objection that the proof was incompetent and immaterial. * * * (N)o objection was taken as to the form of the offer; * * * and it would be unjust to the defendant to deprive him in this court of the benefit of his offer on grounds not presented to the Court below" (Page 310). The case was reversed.

The identical issue was also presented to the Sixth Circuit Court, in the case of *Columbus Ry. Co. v. Patterson,* 143 Fed. 245. It is stated in syllabus 2, as follows:—

> "An objection to the admissibility of a deposition in a federal court on the ground that it is not shown that the witness is at the time of trial without the reach of a subpoena, is waived if not made at the time, and will not be considered when made for the first time in the appellate court."

At the trial of the *Patterson* case, the defendant offered a deposition. "Upon the objection of counsel for plaintiff, the court excluded the deposition * * *" (at page 246). The objection was of a technical nature going to the form of the deposition's certificate. Verdict was rendered for plaintiff, defendant appealed and the case was reversed on this sole point. On appeal the Circuit Court held the exclusion on the basis of the objection made at trial was erroneous; however, plaintiff attempted to support the ruling on another ground which had not been raised at the trial. The court stated in its opinion:

> "* * * it is a familiar rule that when upon the trial of a cause a party rests an objection upon a stated ground he cannot afterwards suggest some other ground for its support not brought to the attention of the court and opposing counsel at the trial. Especially is this so when the latent ground is one which could have been removed if it had been brought to view" (Page 249).

Actually the Eighth Circuit Court in the present case was in error in stating there was *no evidence* in record that the truck was pushed (Apx. 10,11). We submit that evidence that the truck was pushed was clearly established by the record. See Record 16, 17, 18, 38, Ex. 3A at p. 113, Ex. 5 at p. 114, Ex. 7 at p. 115, Ex. 11 at p. 116, Ex. 15 at p. 117 and Ex. 23 at p. 119. Furthermore, very shortly after the ruling on the hypothetical there was clear, specific, unequivocal, and express testimony which was not objected to, that established that the bus was actually pushed (R. 44). Obviously, this is clearly a case, even if we assume the evidence did not establish the pushing at the time the hypothetical was asked, where, if objection had been made at the trial, the claimed objection upon which the circuit court based its decision could readily have been corrected by this petitioner either by rephrasing the question or by laying further foundation. Furthermore, the alleged defect actually was eliminated, if it ever in fact existed.

The issue presented here is a vital one: Shall a party be deprived, as petitioner was here, of the benefit of the vital testimony of an eminently qualified expert witness, where the substance of the question was entirely proper, solely because the appellate court believes the question was objectionable for a reason not presented at trial, especially where, if such objection had been made at trial, it could have quickly and readily been corrected and it was in fact later so corrected. The decision of the Eighth

Circuit is in direct conflict with the *Kirtland* and *Patter-con* cases, above quoted from.

c) The objections made by Respondents to petitioner's hypothetical question were of three types, namely:— 1) a general objection on the merits, that the question invaded the province of the jury; 2) general objections to foundation including the general objection that the hypothetical question did not set forth a correct resumé of the facts; and 3) three specific objections to the foundation of the question (R. 42).

The first general objection on the merits was fully and correctly disposed of by the Circuit when the propriety of the admission of expert testimony for the purposes here disclosed was determined to be proper (Apx. p. 10).

d) The general foundational objections of Respondents to the hypothetical question do not include specific objections not raised at trial. This Eighth Circuit Court case is in direct conflict with the following and many other applicable decisions:

In *Noonan v. Caledonia Mining Co.*, 121 U. S. 393, 400, 7 S. Ct. 911, 915, 30 L. Ed. 1061, 1063, certain evidence was objected to as immaterial, irrelevant, and incompetent; however, in the Supreme Court a specific objection was urged that the tendered evidence had not been properly authenticated. The Supreme Court stated:

> "The rule is universal, that where an objection is so general as not to indicate the specific grounds upon which it is made, it is unavailing on appeal * * *. The authorities on this point are all one way."

The Eighth Circuit Court in its opinion (Apx. p. 24) specifically held that, "objections to the admission of evi-

dence must be specific in federal courts," and cited *Taylor v. Taylor*, 8 Cir., 211 F. 2d 794, 797; *Een v. Consolidated Freightways*, 8 Cir,. 220 F. 2d 82, 87-8. Although the Eighth Circuit applied that rule, in one minor instance against Solomon, in this major matter they failed to consistently apply it in Solomon's favor. The Eighth Circuit's action here is, in effect, an absolute denial of the rule and is in conflict with holdings of the United States Supreme Court, and other Circuits and even in conflict with their own holdings.

e) The Respondents made three specific foundational objections to the hypothetical question (R. 42). None of these include the ground specified by Eighth Circuit Court as its justification for affirming this case (Apx. 11). These three specific objections do not include and are no basis for different specific objections. In this respect this Eighth Circuit decision is in direct conflict with other federal authorities.

In *Knight v. Loveman, Joseph & Loeb, Inc.*, 1954, 5 Cir., 217 F. 2d 717, 719 the court stated:

> "Now, and for the first time on this appeal, appellant seeks to raise (a new specific objection, different from the specific objection made at the trial). * * * It is fundamental that where an objection is specific it is deemed to be limited to the ground or grounds specified and it does not cover others not specified. * * * This has long been the practice in federal courts and this practice is now codified in Rule 46 of the Federal Rules of Civil Procedure, 28 U. S. C. A. * * *."

In *Johnston v. Reily*, 1947, U. S. Ct. App., D. C., 160 F. 2d 249, 250, the court said:

> "It has always been the rule of practice in the federal courts that an objection to the admission of evidence

must state the specific ground. In Noonan v. Caledonia Gold Mining Co., 1887, 121 U. S. 393, 7 S. Ct. 911, 30 L. Ed. 1061, the Supreme court said: (and here it quoted from that case the statement set forth above in this Petition at page 34, and then the court continued) 'Objections to the admission of evidence must be of such a specific character as to indicate distinctly the grounds upon which the party relies, so as to give the other side full opportunity to obviate them at the time, if under any circumstances that can be done.' That statement has been quoted many times in the federal courts, and the doctrine appears to have been followed without exception in civil cases. Rule 46 of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723 c, requires that a party must make known to the court his objection 'and his grounds therefore.' The Rule is a codification of the rule of practice already existing. This is not a mere technicality but is of substance in the administration of the courts. * * *(W)hen the objection is specific it is deemed to be limited to the ground or grounds specified, and it does not cover others not specified."

f) The reasons for Rule 46, above referred, have been stated in many cases. For example, in *Employers Mut Casualty Co. v. Johnson,* 1953, 5 Cir., 201 F. 2d 513, the court said at pages 155 and 156:

"When an objection is made to the introduction of evidence, the grounds therefor must be clearly and specifically stated for the benefit of the court and opposing counsel in order that the objection, if sustained, may be cured by additional evidence."

In *Revlon, Inc. v. Buchanan,* 1959, 5 Cir., 271 F. 2d 795, the court said at page 798:

"The importance of timely objection assigning specific ground is obvious. The cases cited hold clearly that the reason for the attempted exclusion of the evidence must be stated. This is so in order that the court may

> remove the objection itself, or that the litigants may have a chance to make other proof for that purpose."

As heretofore pointed out, if any error did exist in the statement of the hypothetical question, and we assert there was none, nevertheless it *not only could, but actually was, obviated and corrected.* There can be no justice, we respectfully submit, in the approval of this new Eighth Circuit Court rule that will permit a party to be deprived of the testimony of an essential and key witness for a reason not even raised at the trial, especially where the basis for the objection was actually eliminated by other evidence in the record. No factual situation could better illustrate the importance of, and the reason for, the above rules, than this case.

g) This Eighth Circuit Court decision is also in effect, directly in conflict with that of *Ringstad v. Grannis*, 9 Cir., 1947, 159 F. 2d 289, where the court held in syllabus 5 that:

> "A law suit is not a game between opposing counsel but a proceeding in which the Court seeks to do justice between opposing litigants and *litigants must* be assisted in the search for justice *by a clear understanding of the ground for the Court's ruling where the litigant's attorney requests it.*" (Emphasis supplied.)

Counsel for Solomon expressly asked the trial court to state the basis for its ruling. The trial court refused (R. 42). The Sixth Circuit, in the *Grannis* case, we believe, correctly holds that the trial court must state the basis for its ruling when such a request is made. The Eighth Circuit Court now holds, in effect, that the trial court does not need to state the basis for its ruling. We believe that is incorrect. If the basis of the trial court's ruling had been stated during the trial to be the ground the Eighth Circuit Court now relies upon, it could readily have been eliminated

and Solomon would have presented to the jury this important testimony of his expert witness instead of having been deprived of such evidence to his very great prejudice. Paraphrasing the *Grannis* case, we ask, was this present lawsuit "a game between opposing counsel" or was it "a proceeding in which the Court seeks to do justice?" We suggest that this conflict between jurisdictions be resolved for the benefit of future litigants.

h) A most important principle of appellate review, which potentially could arise in every future appellate case, is here presented, namely:— Is it proper for an appellate court to approve a trial court's exclusion of evidence upon a specific ground which was not raised at trial, particularly (1) where the counsel asked the trial court to state the grounds for his ruling and the trial court refused to state them, and (2) where, if the objection had been made at the trial, the objection could readily have been obviated either by rephrasing or by laying further foundation?

CONCLUSION

The decision of the Eighth Circuit in this present case involves major legal problems of great importance to a large number of people.

1. The sweeping changes, during the last decade or so, in many circuit court decisions relating to review of excessiveness of jury verdicts, with the result that all other circuits have adopted a more liberal standard than the Eighth Circuit, and many of the circuits have adopted a much more liberal standard than the Eighth Circuit, make imperative a review by this Supreme Court of this conflict of decisions between circuits and a determination as to the correctness of the rule of the Eighth Circuit, and especially is this so because the question as to whether

the Seventh Amendment to the Constitution applies was specifically reserved by this Supreme Court for later review (*Neese v. Southern Railway Company*, 1955, 350 U. S. 77, 76 S. Ct. 131, 100 L. Ed. 60).

2. The construction placed by the Eighth Circuit Court on the Nebraska statute which defines the place where motorists must stop at railroad crossings and at arterial highway crossings, in order that the motorist may avoid being held to be negligent, affects every person who drives on Nebraska highways. A proper construction of this statute is of the utmost concern to this enormous group of motorists.

3. The decision, which holds in effect that the Eighth Circuit Court was bound by obiter dicta (not even amounting to judicial dicta) from reports of a state court of last resort, is in conflict with decisions from other circuits. The issue is an important problem, which often arises to trouble circuit courts and the matter should now be resolved.

4. There is hardly any more important matter of trial procedure than what and how and when objections are to be made at the trial. Are general objections valid? If one specific obpection is made at trial, can a different one be considered on appeal? Must a trial judge state the reason for his ruling on an objection where he is asked? Can an appellate court affirm an order excluding evidence for a new reason presented for the first time on appeal? Is the answer to any of these questions changed in situations, where, to make known the objection at trial, would permit opposing counsel to rephrase his question, lay additional foundation or otherwise correct the matter objected to? All of these questions are raised here. They

occur many times, probably, in every federal trial. The position taken here by the Eighth Circuit is in direct conflict with decisions of the United States Supreme Court and with other circuit court cases and is in direct violation of Rule 46 of the Federal Rules of Civil Procedure. It is of great importance that this court now resolve the conflict.

This Court should grant certiorari and the judgment below should be resversed.

Respectfully submitted,

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APPENDIX I

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 16,584

Solomon Dehydrating Company, Incorporated,
Appellant,
vs.
Clarence R. Guyton,
Appellee.

On Motion to Discharge or Reduce Amount of Attachment Redelivery Bond.

[October 18, 1960.]

Before JOHNSEN, Chief Judge, and MATTHES, Circuit Judge.

PER CURIAM.

As an incident of its appeal to this Court from a judgment rendered against it, appellant seeks by motion to have us discharge or reduce the amount of the attachment, which had been made against it on its non-resident status, under Neb. R.R.S. 1943, §25-1001, in the relationship thereof to the redelivery bond which had been executed by appellant in substitution for and restoration of the property.

The motion is predicated on the ground that supersedeas has been made of the amount of the judgment for purposes of the appeal, and that there accordingly is no need or right to a continuance of the attachment security.

In its granting and fixing of the amount of supersedeas under Rule 73(d), Federal Rules of Civil Procedure, 28 U.S.C.A., the District Court had ordered that the attachment redelivery bond should remain in effect until final termination of the action. This it had the authority and discretion to do, since under Rule 73(d) the supersedeas security would have application only in case of the affirmance or a modification of the judgment appealed from. Should the judgment be reversed or vacated, no immediate security would exist as to any future judgment which might be rendered in appellee's favor, except the attachment redelivery bond, in the significance which that fact could have in the circumstance of appellant's non-resident status.

The trial court necessarily was called upon to exercise its judgment and discretion in relation to these realities, and no facts are made to appear which would entitle us to say that it has been guilty of an abuse. The court would have had the right in fixing supersedeas to take into account, if it chose, the amount of security existing from the attachment, under the implication of the provisions of Rule 73(d) that "When the judgment is for the recovery of money not otherwise secured, the amount of the (supersedeas) bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond". But appellant chose to ac-

cept and provided the amount of supersedeas which the court fixed, and in relation to which the court further directed that the attachment redelivery bond should remain in effect until the final termination of the litigation.

Appellant's motion to have us discharge or reduce the amount of the attachment redelivery bond is in the circumstances without any legal or equitable basis for us to examine the discretion which the trial court was entitled to exercise, and it is accordingly denied.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eight Circuit.

APPENDIX II

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 16,584

Solomon Dehydrating Company, Incorporated, Appellant, v. Clarence R. Guyton, Appellee, Central Greyhound Lines, Incorporated, and The Greyhound Corporation, Appellees.	Appeal from the United States District Court for the District of Nebraska.

[July 19, 1961.]

Before VOGEL and BLACKMUN, Circuit Judges, and BECK, District Judge.

BLACKMUN, Circuit Judge:

This diversity action arises out of a bus-truck collision which took place about 1:45 a.m., July 29, 1959, on U. S. Highway No. 30 three and three-quarters miles east of

Kearney, Nebraska. The vehicles concerned were an eastbound Greyhound Scenicruiser bus traveling the highway on a regular run and a northbound 2-ton truck endeavoring to cross the artery. The night was clear and the pavement was dry.

Clarence R. Guyton, age 60, was the bus driver. The Greyhound Corporation was the owner of the bus. Arnold Fisher was the truck driver. Solomon Dehydrating Company, Incorporated, was the owner of the truck. Fisher was Solomon's employee; he was working on the night in question and was driving the truck in the course of his employment.

Guyton sued Solomon for personal injuries sustained in the accident. He joined Greyhound as a defendant, as he was required to do by § 48-118, 1960 Reissue of Volume 3A, Revised Statutes of Nebraska of 1943, in order to determine his employer's subrogation rights under the Nebraska Workmen's Compensation Law. Solomon filed a counterclaim against Guyton and a cross-claim against Greyhound for damages to its truck. Greyhound filed a cross-claim against Solomon for damages to its bus and for loss of its use. All these claims were based upon the alleged negligence of Fisher and Guyton, respectively. Jury verdicts of $74,132.63 in favor of Guyton against Solomon and of $16,356.77 in favor of Greyhound against Solomon were returned. The jury also rendered verdicts in favor of Guyton and Greyhound on Solomon's counter and cross-claims. Judgments were entered accordingly. Solomon has appealed.[1]

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[1] Our denial of the appellant's motion to discharge or reduce the attachment which has been made against it as a non-resident under § 25-1001, 1956 Reissue of Volume 2, Revised Statutes of Nebraska of 1943, is reported at 283 F.2d 247.

We have often observed that no useful purpose is served in setting forth in detail the evidence in these personal injury cases arising out of automobile accidents. *Berlo Vending Company* v. *Massey*, 8 Cir., 260 F.2d 832; *Johnson v. Hill*, 8 Cir., 274 F.2d 110, 112. We therefore refer to the facts here only as it becomes necessary so to do in considering the issues before us.

The appellant urges as error:

1. *The insufficiency of the evidence.* This is directed both to the submission to the jury of claimed specific acts of negligence on the part of Fisher and to the trial court's denial of Solomon's motion for judgment notwithstanding the verdicts. The appellant's argument centers primarily on what it regards as inconsistencies within the plaintiff's evidence of such degree and of such contrariety to undisputed physical facts as to require the evidence to be disregarded.

We are aware, as Solomon urges, (a) that the fact Fisher drove the truck onto the highway does not, standing alone, establish negligence on his part, *Bezdek* v. *Patrick*, 167 Neb. 754, 94 N. W. 2d 482, 491; (b) that

> "Where a plaintiff, without reasonable explanation, testifies to facts materially different concerning a vital issue than had previously been testified to by him under oath in another action, the change clearly being made to meet the exigencies of the pending action, the evidence is discredited as a matter of law and should be disregarded".

Gohlinghorst v. Ruess, 146 Neb. 470, 20 N. W. 2d 381; *Rahfeldt* v. *Swanson*, 155 Neb. 482, 52 N. W. 2d 261, 266; *Carranza* v. *Payne-Larson Furniture Company*, 165 Neb. 352, 85 N. W. 2d 694, 697; and (c) that testimony which is in conflict with undisputed physical facts is not entitled

to credence, *Dodds* v. *Omaha & C. B. St. Ry. Co.*, 104 Neb. 692, 178 N. W. 258, 261; *Varnum* v. *Union Pac. R. Co.*, 112 Neb. 340, 199 N. W. 503, 505; *Hessler v. Bellamy*, 128 Neb. 571, 259 N. W. 514, 515; *United States* v. *Harth*, 8 Cir., 61 F.2d 541, 544; *Liggett & Meyers Tobacco Co.* v. *De Parcq*, 8 Cir., 66 F.2d 678, 683, cert. den. 298 U. S. 680; *Jacobson* v. *Chicago, M. St. P. & P. R. Co.*, 8 Cir., 66 F.2d 688, 693. But we are also aware (a) that where there is a reasonable dispute as to what the physical facts show, conclusions to be drawn therefrom are for the jury, *Kroeger* v. *Safranek*, 165 Neb. 636, 87 N. W. 2d 221, 224-5, and (b) that in a situation such as the one before us

> "We are required to determine whether there is any substantial evidence upon which the verdicts for the plaintiffs could properly be based. For the decision of that question, we must assume as established all the facts that the *evidence supporting the plaintiffs' claims* reasonably tends to prove and that there should be drawn in the plaintiffs' favor all the inferences fairly deducible from such facts. * * * We must also give effect to the rule that issues that depend upon the credibility of witnesses, and the effect or weight of evidence are to be decided by the jury". *Elzig v. Gudwangen*, 8 Cir., 91 F.2d 434, 439.

See, also, *Hanson* v. *Ford Motor Company*, 8 Cir., 278 F. 2d 586, 596.

The claimed variances in Guyton's own testimony are differences between his testimony at the trial and that given on two depositions before trial. One of the depositions was taken by the State for a justice court proceeding it brought against Fisher; the other was taken on behalf of Solomon in the present action. Disparities between Guyton's testimony and that of other witnesses on his behalf are also pointed out. These all have to do in the main with (a) the location of the truck when Guyton

first saw it; (b) the distance between the bus and the truck when Fisher stopped at the stop sign; (c) the point where Guyton first applied his brakes; (d) the point where the bus and a westbound transport vehicle passed each other on the highway; (e) the position of the transport (the existence of which Fisher denied) when its driver saw the truck stop; (f) the speed of the truck; and (g) the place of impact. A chart of these differences in the evidence was included in the appellant's brief; that brief also sets forth at length mathematical interpretations of the testimony and attempts to prove the impossibility of the accident having taken place if parts of the testimony are true. We have studied the chart and these computational arguments.

While a mathematical approach is often forceful and is sometimes persuasive, it is not convincing here. We have in mind that this accident took place in very early morning hours; that it was dark at the time; that distances at night may be difficult to estimate with complete accuracy; that the vital events, namely, the passing of the bus and the transport, the emergence of the truck onto the highway, the application of the brakes of the bus, its swerve to the north, and the speed of the truck, all took place or required observation within passing seconds; and that, where time and area are compressed, differences of only a few miles per hour in speed or of only a few feet in distance lead to vividly contrasting results.

While there are discrepancies here (and, for that matter, in Fisher's testimony, too), there is also corroborating testimony. We regard the appellant's contentions on this point as material essentially appropriate for an argument to a jury rather than to an appellate court which is confined, as to this aspect of the case, to the

limits specified by the *Elzig* and *Hanson* cases cited above. Any disparity in testimony here, it seems to us, is not of that degree of offensiveness which requires disbelief as a matter of law. We feel that it is of the nature and kind so often encountered in the normal give and take of a vigorously contested lawsuit concerned with the crowded events of a few short moments. We may appropriately assume that these variances were artfully argued to the jury. The factual situation is obviously different from those presented by *Gohlinghorst* and its line of cases, supra, urged upon us by the appellant. The Nebraska court has described and distinguished its conclusions in those cases as being grounded upon estoppel elements and the conviction that the plaintiff's testimony if permitted would result in a mockery of justice. *Kipf v. Bitner,* 150 Neb. 155, 33 N. W. 2d 518, 523-4; *Angstadt v. Coleman,* 156 Neb. 850, 58 N. W. 2d 507, 513-4; *Kirchner* v. *Gast,* 169 Neb. 404, 100 N. W. 2d 65, 74-5. We feel that the situation here is one presenting nothing more than a reasonable dispute about physical facts and that, to the extent testimony discrepancies do exist, they are in the nature of admissions for the jury to consider and are thus controlled by the *Kipf, Angstadt* and *Kirchner* cases rather than by *Gohlinghorst.*

We readily conclude that the evidence was sufficient and appropriate to take the questions of Fisher's negligence to the jury.

2. *The exclusion of the testimony of Solomon's expert witness Weiland concerning the speed of the bus.* Weiland was a consulting engineer and professor of mechanical engineering at the University of Nebraska. That he was "eminently qualified in his field" was recognized by the trial court. He had examined neither the accident scene

nor the vehicles involved. He testified, however, that he had seen the exhibits and heard the trial testimony and that he is able to calculate the speed of vehicles just prior to collision if he has examined the exhibits and knows the type of road surface, the length of skid marks, the distance the vehicles traveled after the collision, the weights of the vehicles and the relative amount of damage. The usual hypothetical question was propounded. An objection thereto, setting forth claimed defects in the question, was sustained. An offer of proof was made to the effect that, if the witness were permitted to answer, his opinion would be that the bus must have been traveling at least 65 m.p.h. at the time of the collision.

We recognize that the propriety of admission of expert testimony is controlled by the rule applied in the federal courts or by the prevailing Nebraska rule, whichever favors its reception, Rule 43(a), F.R. Civ. P., 28 U.S.C.A., and that under Nebraska law "a qualified expert may give his opinion as to the speed of the automobile, based on the length of the skid marks, made by it". *McKinney* v. *Wintersteen,* 122 Neb. 679, 241 N. W. 112, 114; *Tate* v. *Borgman,* 167 Neb. 299, 92 N. W. 2d 697, 701; *Nisi* v. *Checker Cab Co.,* 171 Neb. 49, 105 N. W. 2d 523, 529.

We conclude, however, that the trial court did not err in sustaining the objection to Professor Weiland's opinion testimony as to the speed of the bus. While both Guyton and Greyhound assert several claimed defects in the hypothetical question, it is sufficient to say that the question's inclusion of an assumption that "the truck was pushed sidewise in an Easterly and Northerly direction for a distance of approximately 110 feet" is enough to render the question objectionable and the answer inadmissible. There is no evidence in the record which sup-

ports a conclusion that the truck was *pushed* sidewise by the bus. True, the truck ended up at a distance from the point of contact. The truck and the bus, however, went their respective ways. The truck eventually landed on its right side north of the highway. The bus remained upright and finally stopped in the borrow pit south of the road. Fisher was thrown clear of his truck and did not know what happened to it after the impact. Neither, apparently, did Guyton or any other witness. The driverless truck, so far as this record shows, may well have reached its ultimate destination, before it turned on its side, in part by the power of its own first gear. Inasmuch as the hypothetical question embraced an important fact not supported by the evidence, it is defective and subject to objection. *Metropolitan Life Ins. Co.* v. *Armstrong,* 8 Cir., 85 F. 2d 187, 190; *Aetna Life Ins. Co.* v. *McAdoo,* 8 Cir., 106 F.2d 618, 622; *Wessel* v. *City of Lincoln,* 145 Neb. 357, 16 N. W. 2d 476, 481; *McNaught* v. *New York Life Ins. Co.,* 143 Neb. 213, 12 N. W. 2d 108, 113.

3. *The instruction as to the right-of-way line.* The highway pavement at the place of the accident was 24 feet wide. A stop sign on the intersecting road was 25 feet south of the south edge of the pavement and was at the south side of a small bridge or culvert. There is no question that Fisher brought his vehicle to a complete stop at the stop sign. There is also no dispute that once he left that spot he did not stop again before the collision.

§ 39-729, 1960 Reissue of Volume 3, Revised Statutes of Nebraska of 1943, reads in part:

> "All vehicles entering or crossing highways or railroad crossings on which stop signs are erected shall come to a full stop as near the right-of-way line as possible, before entering or crossing such highway or

> railroad crossings, and, regardless of directions, shall give the right-of-way to vehicles upon the highways to be driven upon or crossed."

The trial court in its instructions, after quoting this statute and then paraphrasing it, stated:

> "The right-of-way line as used in the statute means that portion of the highway set aside for public travel. As applied to this case therefore, bearing in mind that Highway 30 in the area in question is a state and federal highway, and because of the stop sign at the intersection in question, it would be the duty of a driver approaching Highway 30 to come to a full stop as near the curb line—or right-of-way line —as possible before driving onto it and give the right-of-way to vehicles upon the highway until such time, after stopping, as he could drive onto the highway without interfering with the traffic thereon."

An exception to this was taken by Solomon "for the reason that the right-of-way line of highways under the statutes of the State of Nebraska is not defined thusly, and it is the intention of said statute to define the right-of-way line as the outside line of the highway itself, and is not confined to just the main traveled portion of said highway." Solomon also tendered its own instruction relative to stop signs; this is set forth in the margin.[3]

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[3] "You are instructed that stop signs are usually erected some distance from the entrance to a through highway in order to afford approaching motorists time to stop before they reach the highway. *It may not be sufficient to stop where the stop sign is erected in order to comply with the statute requiring motorists to stop at the entrance to the highway as near the right-of-way line as possible.* The driver of a motor vehicle about to enter upon a favored highway should stop at a place where he can see in both directions and should not pull out into the highway without first determining that such movement of his vehicle

The grounds here specified by Solomon for his objestion to the instruction are that it is vague, indefinite, and confusing, that it is prejudicial in view of the court's further instruction that violation of a statute was evidence of negligence, that it is incorrect, and that the standard it sets up is absurd and impractical.

We feel that this contention of the appellant cannot prevail. We note initially that objections of vagueness, indefiniteness and confusion were not made in the trial court. This being so, they cannot be raised for the first time on appeal. Rule 51, F.R. Civ. P., 28 U.S.C.A.

> "There are two answers to appellant's criticism of the court's original charge to the jury. The first is that the appellant made no objection to the charge on the grounds now assigned for reversal." *Hansen* v. *St. Joseph Fuel Oil & Manufacturing Co.*, 8 Cir., 181 F.2d 880, 885, cert. den. 340 U.S. 865.

Furthermore, the appellant's own requested instruction is not out of line with the instruction given.

> "A party cannot complain of an alleged error in instructions when the same error is found in its own instructions." *Krienke* v. *Illinois Central Railroad Company*, 7 Cir., 249 F.2d 840, 846.

Twentieth Century-Fox F. Corp. v. Brookside Th. Corp., 8 Cir., 194 F.2d 846, 855, cert. den. 343 U.S. 942; *Badgett* v. *Johnson-Fife Hat Co.*, 8 Cir., 85 Fed. 408, 411; *Little Rock & M. R. Co.* v. *Moseley*, 8 Cir., 56 Fed. 1009, 1010;

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can be made with reasonable safety to himself and to those traveling upon the favored highway, and he should look in both directions and permit all vehicles to pass which are at such distance and traveling at such a rate of speed that it would be obviously dangerous or imprudent for a driver to proceed into said intersection." (Emphasis supplied)

Silverman v. *Travelers Insurance Company*, 5 Cir., 277 F.2d 257, 262.

Finally, the trial court's instruction does not appear to be inconsistent with the interpretation given the statute by the Supreme Court of Nebraska. The appellant points out that § 39-741(5), 1960 Reissue of Volume 3, Revised Statute of Nebraska of 1943. defines the term "highway" to mean "* * * every way or place of whatever nature open to the use of the public, as a matter of right, for the purposes of vehicular travel * * *" and that the Nebraska court has adopted this definition in connection with automobile litigation. *Koutsky v. Grabowski*, 150 Neb. 508, 34 N. W. 2d 893, 897. Subdivision (9) of § 39-741, however, also defines "right-of-way" to mean "the privilege of the immediate use of the highway" and thus connects the phrase with use.

In *Styskal* v. *Brickey*, 158 Neb. 208, 62 N. W. 2d 854, 860, the Nebraska court related the phrase "curb line", employed by the trial court here, to their statutes' several uses of the phrase "right-of-way line":

> "Bearing in mind that Railroad Avenue is a state highway carrying U. S. Highways Nos. 73 and 75 it would ordinarily, because of the stop sign, be the duty of any driver of a vehicle approaching it to come to a full stop as near the curb line as possible before driving onto it and give the right-of-way to vehicles upon the highway until such time, after stopping, as he could drive onto the highway without interfering with the traffic thereon. See sections 39-724 and 39-754, R.R.S. 1943."

This language was quoted with approval in the case of *Paddack* v. *Patrick*, 163 Neb. 355, 79 N. W. 2d 701, 705; in that case the court went on to say, pp. 706-7 of 79 N. W. 2d:

> "Under this situation we think the following, quoted from *Bohnen v. Gorr*, 234 Minn. 71, 47 N. W. 2d 459, 464, has particular application to appellant's driving under the circumstances here shown: 'A stop sign is intended to warn motorists of the presence of a through or arterial highway. Our statute requires the driver of a vehicle approaching a through highway to stop at the entrance to such highway. Stop signs are usually erected some distance from the entrance to the through highway in order to afford approaching motorists an opportunity to stop before they reach the highway. Where the view of a highway is obstructed at the point where a stop sign is erected, it may not be sufficient to stop where the sign is erected in order to comply with the statute requiring a motorist to stop at the entrance to the highway.' "

Although the intersection here was clear and unobstructed, we gather from these comments of the Nebraska court that relating the phrase "curb line" to the statute in question is proper and is intended to signify not the more distant real estate boundary concept of a right-of-way line but, instead, the traveled portion of the highway. This being so, the trial court's instruction was not incorrect under Nebraska law.

4. *The excessiveness of the verdict in favor of Guyton.* As has been noted, Guyton's verdict against Solomon was for $74,132.63. Solomon claims that this is excessive.

This court has expressed itself many times, and very specifically, on the issue of the reviewability of a judgment claimed to be excessive. We have gone so far as to say, "The assignment of error that the verdict is excessive is not properly addressed to this court", *New York, C. & St. L. R. Co.* v. *Affolder,* 8 Cir., 174 F.2d 486, 493, and cases cited, reversed on other grounds, 339 U.S. 96; *National Alfalfa Dehydrating & Mill. Co.* v. *Sorensen*, 8 Cir., 220

F.2d 858, 861. We have stated that the excessiveness of a verdict "is not a question for our consideration" but is a matter directed "solely to the judgment and the conscience of the trial judge on motion for a new trial". *St. Louis Southwestern Ry. Co.* v. *Ferguson,* 8 Cir., 182 F.2d 949, 954. In reaching this result we have referred at times to the Seventh Amendment and to the common law as it existed in 1791 upon the Amendment's adoption, *Myra Foundation v. United States,* 8 Cir., 267 F.2d 612, 614 *Agnew* v. *Cox,* 8 Cir., 254 F.2d 263, 267, and to earlier English and federal cases, *St. Louis Southwestern Ry. Co. v. Ferguson,* supra, p. 955 of 182 F.2d. Instances within the last three plus years of our continuing adherence to the general rule we have expressed are *American Surety Company* v. *Schottenbauer,* 8 Cir., 257 F.2d 6, 13-14; *Myra Foundation* v. *United States,* supra, p. 614 of 267 F.2d; *McDonnell v. Timmerman,* 8 Cir., 269 F.2d 54, 62-3; *Johnson* v. *Hill,* supra, p. 117 of 274 F.2d; and *Lycon v. Walker,* 8 Cir., 279 F. 2d 478, 485; see also *MacDonald Engineering Company* v. *Hover,* 8 Cir., . . . F.2d . . ., (May 19, 1961).

On the other hand, we have intimated that reviewability might be in order "as a matter of correcting an absolutely plain injustice, in the interest of judicial administration itself", *Louisville & N.R. Co. v. Botts,* 173 F.2d 164, 170, or "in the exceptional case, 'where the verdict is so manifestly without support in the evidence that failure to set it aside amounts to an abuse of discretion' on the part of the trial court", *Chicago & N. W. Ry. Co.* v. *Curl,* 8 Cir., 178 F.2d 497, 502, or where the verdict is "so excessive as to be monstrous or to shock the judicial conscience", *Chicago, Rock Island & Pacific Railroad Co.* v. *Williams,* 8 Cir., 245 F.2d 397, 406, cert. den. 355 U.S. 855; *Agnew* v. *Cox,* supra, p. 268 of 254 F.2d; *Chicago Great Western Railway Company v. Casura,* 8 Cir., 234 F.2d 441,

448-9; *Glendenning Motorways* v. *Anderson*, 8 Cir., 213 F.2d 432, 437; *St. Louis Southwestern Ry. Co. v. Ferguson*, supra, pp. 955-6 of 182 F.2d. And in at least one instance, we have reversed a judgment because, among other things, we concluded that the verdict was "so excessive as to shock the conscience" and was "not fairly supported by the evidence", *Missouri-K.-T. R. Co. of Texas* v. *Ridgway*, 8 Cir., 191 F.2d 363, 368.

We recognize now, as we did ten years ago in *Ridgeway*, supra, p. 367 of 191 F.2d, that other federal circuits have held "that an appellate court may review as a question of law whether the trial court abused its discretion in refusing to set aside a verdict for excessiveness". We are also aware that Professor Moore in Volume 6, Moore's Federal Practice, Second Edition, 1953, Par. 59.08[6], pp. 3824, 3827-9, 3834, 3836 and 3839, has observed that

> "The reviewability of a trial court's grant or denial—usually the trial court's denial—of a motion for new trial on the ground of inadequacy or excessiveness has been the subject of much discussion. And, as we shall see, there is considerable conflict in the decisions as to the power of an appellate court to review, with the current tendency, however, in the direction of a broader appellate review * * * Recently, the courts of appeals faced with the question of review have generally ignored the Seventh Amendment issue * * * And so, under one theory or another, the Seventh Amendment does not interdict all appellate review of the trial court's ruling. * * * Despite the above criticism [Judge Learned Hand's in *Miller v. Maryland Casualty Co.*, 2 Cir., 40 F.2d 463, 465], with deference, we submit that such a review is apropos and convenient * * * (T)he Eighth and the Second Circuits are the most adamant expounders [of the doctrine of non-reviewability] * * * The theory upon which the majority of the circuits review * * * is that the trial judge has abused his discretion. * * * Thus, the First,

> Third, Fourth, Sixth, Seventh, Ninth and Tenth Circuits and the District of Columbia now recognize that they may reverse a judgment even though the only basis for review is the inadequacy or excessiveness of the verdict".

Since the 1953 edition of Moore's treatise, the Fifth Circuit has clearly stated that it may review the question of excessiveness on the theory that abuse of discretion is an error of law. *Silverman v. Travelers Insurance Company*, 1960, 5 Cir., supra, pp. 259-60 of 277 F.2d, and cases cited. And just a few weeks ago the Second Circuit arrived at the same result (although still concluding that the verdict there should not be disturbed) in a comprehensive opinion by Judge Medina where legal commentaries and cases in 47 states and in all the federal circuits were cited and where the Court concluded that the Seventh Amendment presented no barrier to review.[*] *Dagnello v. Long Island R.R. Co.*, 1961, 289 F.2d 797. On the other hand, Professor Charles Alan Wright, for one, is not so enthusiastic about this trend. Wright, *The Doubtful Omniscience of Appellate Courts*, 1957, 41 Minn. L. Rev. 751, 752-758; 3 Barron and Holtzoff, *Federal Practice and Procedure* (Wright Revision 1958) § 1302.1, pp. 348-352.

We are not sure that this circuit is quite the "adamant expounder" of the doctrine of non-reviewability which Professor Moore and Judge Medina (by quoting Moore, p. 800 of 289 F.2d) would make us out to be. Our expressions in the *Botts, Curl, Williams, Agnew, Casura, Ander-*

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[*] It seems fair to say that the Supreme Court has not directly decided the Seventh Amendment issue. See *Southern Ry. Co.* v. *Bennett*, 233 U.S. 80, 87; *Dimick* v. *Schiedt*, 293 U.S. 474; *Fairmount Glass Works v. Coal Co.*, 287 U.S. 474; *Affolder* v. *N.Y.C. & St. L.R. Co.*, 339 U.S. 96; *Neese* v. *Southern Railway Co.*, 350 U.S. 77.

son, Ferguson and *Ridgeway* cases, all supra, could be said to contraindicate that. And we wonder whether in fact we did start "to wobble a bit" eleven years ago, as suggested at p. 802 of 289 F.2d. We do emphasize again, however, that in our opinion, inadequacy or excessiveness of a verdict is basically, and should be, a matter for the trial court which has had the benefit of hearing the testimony and of observing the demeanor of the witnesses and which knows the community and its standards; that this is a responsibility which, for better working of the judicial process and for other seemingly obvious reasons, is best placed upon its shoulders; and that we shall continue to consider review, as we have said before, not routinely and in every case, but only in those rare situations where we are pressed to conclude that there is "plain injustice" or a "monstrous" or "shocking" result. Perhaps this is saying nothing more and nothing different than what the other courts of appeals have said in varying language.[1] Perhaps in practice this court has observed a somewhat tighter standard than the others. In any event, we still adhere to it.

In any event also (and again employing what seems to be the usual alternate approach), we are convinced that, irrespective of the theory one might choose to advance in favor of reviewability—sufficiency of the evidence to support the verdict, abuse of discretion, historical approach, and so on—the verdict in this particular case must remain

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[1] "And so we hold we have the power to review the order of a trial judge refusing to set aside a verdict as excessive. If we reverse, it must be because of an abuse of discretion. If the question of excessiveness is close or in balance, we must affirm. The very nature of the problem counsels restraint." *Dagnello* v. *Long Island R.R. Co.*, supra, p. 806 of 289 F.2d.

undisturbed. We are aware of the details of the medical testimony concerning Guyton—the fractures, the knock-kneed deformity, the right foot drop, the first reduction, the arthrodesis of the hip, the bone graft, the fibrosis, the application of casts, the right thigh atrophy, the hospitalization, the percentages of disability, and the other facts of injury and treatment. We need not further describe them or his prognosis or the parties' respective approaches to the computation of special damages. Guyton's verdict was substantial; it may have been more than any of us would have been willing to allow had we been sitting as jurors, and it may have been more than any of us would have approved had we been the trial judge. To say that, however, is merely to express a possibility and one darkened by our absence from the trial itself. We recognize, too, that the evidence shows that Guyton apparently refused, up to the trial, to undergo further surgery, which had been at least suggested and which might have effected some alleviation in the disability of his lower right extremity, and that he apparently also refused to wear a recommended right foot brace. Having in mind the extent of the plaintiff's injuries, his age, his earning power, and his life expectancy, we nevertheless conclude that this verdict is not so out of line as to be deemed legally excessive in the light of our cases already referred to.

5. *The failure to instruct the jury as to the substance of § 39-723.01.* §39-723, 1960 Reissue of Volume 3, Revised Statutes of Nebraska of 1943, in effect at the time of the accident, fixes speed limits for motor vehicles. For a highway outside a city or village it establishes initially a "reasonable and proper" speed standard but goes on to state that no person shall operate a motor vehicle "* * * in any case, except the motor vehicles specified in section 39-723.01, at a rate of speed exceeding * * * sixty-five miles

per hour between the hours of sunrise and sunset, and fifty-five miles per hour between the hours of sunset and sunrise, upon any concrete, brick, macadamized, or other hard-surfaced highway * * *". § 39-723.01 then provides:

> "It shall be unlawful for the driver of any vehicle towing a trailer or semitrailer or of a freight-carrying vehicle, if the gross weight of said freight-carrying vehicle including any load thereon is more than five tons, to drive the same at a speed exceeding fifty miles per hour."

The gross weight of the bus was over five tons. Guyton admitted that the bus "sometimes carried freight but I don't know whether it had any that night". He also testified that at the time of the accident he was driving between 50 and 55 m.p.h. and that he had just traveled the approximately 98 miles from North Platte to Kearney in two hours. If, therefore, the bus was a freight-carrying vehicle within the meaning of § 39-723.01, it was exceeding the speed limit prescribed for that vehicle by the Nebraska statute.

We find no substance in this point. Solomon's failure to assign as error the court's refusal to give the requested instruction encounters the barrier of Rule 51, F.R. Civ. P., 28 U.S.C.A. *Coca Cola Bottling Co. of Black Hills* v. *Hubbard*, 8 Cir., 203 F.2d 859, 862. Furthermore, we are not convinced that a passenger bus occasionally carrying small amounts of special "freight" is the kind of vehicle to which the statute is directed. No Nebraska authority supporting the appellant's position is cited and, in its absence, we share what must have been the trial court's view that § 39-723.01 concerns only a vehicle with a tow and a vehicle which is essentially a carrier of freight and that it is not directed to a passenger bus of the kind here involved.

Compare *State* v. *Public Service Commission of Wisconsin*, 207 Wisc. 664, 242 N. W. 668, 676.

6. *The exclusion of the Wakley testimony.* Guyton testified at the trial that as he approached the scene of the accident he saw to his right the Solomon truck going east on a road parallel to the highway, that he saw it "go down to the corner and turn North and cross the tracks and stop at the stop sign", and that "it was about three-quarters of a mile that I saw the truck but I had him in view". Solomon's witness Wakley, another of its truck drivers, was asked "* * * about where you have to be on that highway, as far as the mill is concerned with that cornfield there and these buildings, before you can look over and see a vehicle traveling on that graveled road East?" This was objected to by Greyhound on the ground that there was no showing that Wakley was driving a vehicle similar to the bus. The objection was sustained and Wakley's answer was not forthcoming. No objection, however, was made by Guyton. Solomon now claims that the purpose of the question was to refute Guyton's prior testimony. It cites authorities to the effect that even incompetent evidence, if admitted without objection, may be considered and that failure to object waives the objection.

Solomon's authorities concern the situation of admitted evidence rather than excluded evidence. So far as the record before us shows, Solomon was content not to point out specifically his claim of admissibility as against Guyton, not to press the matter further, and not to make the offer of proof suggested by Rule 43(c), F.R. Civ. P., 28 U.S.C.A., and thereby to bring its point sharply and informatively to the attention of the trial court. We have held generally that the rejection of testimony is not reviewable in the absence of an offer of proof. *Cavanaugh* v. *Fireman's Fund*

Ins. Co., 8 Cir., 197 F.2d 853, 855; *United States* v. *Stoppelmann*, 8 Cir., 266 F.2d 13, 20; *Johnson v. Hill*, supra, p. 115 of 274 F.2d. This is not a situation where the certainty of what Wakley's answer would be was such that the making of an offer could properly be regarded as a mere futility. *Hawkins* v. *Missouri Pac. R. Co.*, 8 Cir., 188 F.2d 348, 350. The appellant has no basis for complaint as to the trial court's action on this point.

7. *The admission of testimony as to Guyton's driving experience, skill and reputation.* Guyton testified that he had driven close to 2 million miles for Greyhound since 1929. Over Solomon's objection as to immateriality the court permitted him also to testify that he had never had a prior accident. Also over objection solely as to immateriality and incompetency it permitted Greyhound's regional manager to testify about safety awards given Guyton during the period of his employment by Greyhound and to state that "He is rated as tops as far as the company is concerned as an employee or as a person or as a driver". The court at the time did not limit the jury as to its consideration of Guyton's testimony. It did admonish the jury that the regional manager's testimony was received only for the purpose of showing the probability of Guyton's continued employment by Greyhound up to compulsory retirement age 65 and that "* * * it is not a question of what his driving habits might be on any other occasion. Your consideration will be limited to what happened on the night of this accident * * *". In the final instructions no mention was made as to the limited purpose of this evidence.

The parties agree that a person's reputation as a driver is irrelevant and inadmissible to prove or disprove negligence. *Holberg* v. *McDonald*, 137 Neb. 405, 289 N. W. 542,

543. Solomon's confinement of its objections to the generality of immateriality and incompetency and its failure to propose requested instructions outlining what it felt were the proper limitations in the use of the testimony in question leave us with no basis for reversal. Rules 46 and 51, F.R. Civ. P., 28 U.S.C.A. "Objections to the admission of evidence must be specific in federal courts". *Taylor* v. *Taylor,* 8 Cir., 211 F.2d 794, 797; *Een v. Consolidated Freightways,* 8 Cir., 220 F.2d 82, 87-8. Furthermore, even if the admission of this evidence and the court's failure on its own to include a precautionary comment in its final instructions were error, we would consider it, under the circumstances here, as harmless error within Rule 61, F.R. Civ. P., 28 U.S.C.A. We note, for what it is worth, that Fisher, as Solomon's witness, testified on direct examination that he was still working for Solomon, that he was going back to work again on the alfalfa that summer, and that he had never had an accident before with that or any other truck. *Barton* v. *Wilson,* 168 Neb. 480, 96 N. W. 2d 270, 276, cited by Solomon is not controlling.

We have considered each and all of the other points which the appellant has raised. We have carefully read its brief, the record and the supplemental record, and we have studied the exhibit material which has come before us. We find these other points without merit and not of sufficient importance to require detailed comment.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.